No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

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April 3, 1987

BOWNE OF PHOENIX, Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE	1
CONCLUSION	3
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Page

CASES:

Columbia Gas & E. Co. v. American Fuel & Power Co., 322 U.S. 379 (1944) 2

Kansas v. Colorado, 206 U.S. 46 (1907) 1

Vinson v. Washington Gas Light Co., 321 U.S. 489 (1944) 2

Wyoming v. Colorado, 259 U.S. 419 (1922) 1

STATUTES:

Endangered Species Act, 16 U.S.C. §§ 1531-1543 1

Endangered Species Act, 16 U.S.C. § 1531(c)(2) 2

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The National Audubon Society owns and maintains the Lillian Annette Rowe Sanctuary, some 800 acres of habitat along the Platte River, and is currently participating with the State of Nebraska in the Platte River Management Joint Study. To the extent that the Society has water rights associated with the sanctuary and to the extent that it has elected to cooperate with the state in analyzing the management of the Platte River in Nebraska, the Society is adequately represented in these proceedings by the State of Nebraska. *Wyoming v. Colorado,* 259 U.S. 419 (1922); *Kansas v. Colorado,* 206 U.S. 46 (1907).

The Audubon Society, however, asserts that it has a unique interest in Nebraska's petition to enforce the Court's Decree of October 8, 1945, as amended on June 15, 1953. According to the Society, "it is asserting its rights under federal law." Brief in Support of Motion for Leave to Intervene at 10.

The federal law to which the Audubon Society alludes is the Endangered Species Act, 16 U.S.C. Sections 1531-1543, passed in 1973. The Act was prospective in nature, declaring the policy of

the United States to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. Section 1531(c)(2). Failing to recognize that Nebraska seeks to enforce a 40 year old apportionment decree, as opposed to seeking a new apportionment, the Audubon Society complains that "decisions about what water will flow from the North Platte into Nebraska and on to the Platte" may impair Audubon's ability to enforce the Endangered Species Act. *Ibid.* at 9-10. The apportionment, however, is an historic fact.

Not knowing "precisely [it's] contemplated role in this proceeding," Audubon asserts that "at a minimum [it] will seek to establish . . . minimum water flows and release schedules essential for maintaining the habitats of . . . endangered bird populations." *Id.* at 10 n. 10. Like the Platte River Trust, in other words, Audubon does not seek to intervene in the ordinary sense of the word, but to try a new and different case. Audubon should not be allowed to enlarge the issues or alter the nature of the proceedings. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944). Like any other intervenor, Audubon is limited to the issues tried by the original parties. *Columbia Gas & E. Co. v. American Fuel & Power Co.*, 322 U.S. 379 (1944). Accordingly, Audubon should be precluded from intervening for the purposes it seeks to intervene.

CONCLUSION

To the extent the National Audubon Society seeks to aid in the enforcement of the decree, its interests are fully and adequately by the State of Nebraska. Nebraska, however, does not oppose Audubon's appearance in the conventional role of an *amicus curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 3rd day of April, 1987 to:

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